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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1285

GROENDYKE TRANSPORT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL No. 961,
Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAYNE H. RATNER
444 North Market
Wichita, Kansas
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL No. 961,
Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review that part of the decree of the United States Court of Appeals for the Tenth Circuit entered in the above entitled action on January 20, 1967, enforcing the National Labor Relations Board's decision and order overruling petitioner's objections to the conduct of representation election, pursuant to § 9(C) of the National Labor Relations Act, 29 U.S.C.A., § 159(B) and 29 C.F.R. 102.69.

CITATIONS TO OPINION BELOW

The Board's decision and order (R. 1-14) are reported in 154 N.L.R.B. No. 95. See Appendix A, page A1. The Board's supplemental decision on objections of petitioner's conduct of the election (R. 130-137), is an unreported decision but is printed in Appendix B, page A13. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit printed in Appendix C, page A22, is reported in 372 F.2d 137.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was filed on January 20, 1967. Petitioner's motion for rehearing was denied on March 1, 1967.

QUESTIONS PRESENTED

1. Did the Board violate § 9(C) of the National Labor Relations Act, 29 U.S.C.A., § 159(B) and its own rules, 29 C.F.R. 102.69, in conducting a representation election wherein ballots were distributed to employees by United States mail?

2. Are the provisions of the Administrative Procedure Act, Title 5, U.S.C.A., § 1002, applicable to hearings before the National Labor Relations Board, and if so, did the Board comply with the act in the conduct of these proceedings?

3. Was the petitioner denied the right to introduce material evidence in violation of the due process clause of the Fifth Amendment to the United States Constitution?

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are § 9(C) of the National Labor Relations Act, 29 U.S.C.A., § 159(c) (B), Appendix D, at page A35. The Administrative Procedure Act, Title 5, U.S.C.A., §. 1002, Appendix E at page A36. The Board's authority to promulgate rules are set out in Title 29 U.S.C.A., § 156 of the Act, Appendix, E at page A36. The applicable rules of the Board are 29 C.F.R. 102.69, *et seq.*, printed in Appendix F.

STATEMENT OF CASE

I.

The Representation Proceeding

In a representation proceeding, the National Labor Relations Board found that all truck drivers of the respondent employed at its Denver, Colorado, terminal but excluding all other employees, watchmen and supervisors, as defined in the Act, constituted an appropriate unit for the purposes of collective bargaining within the meaning of the National Labor Relations Act, 61 Stat. 136 (1947) as amended, 29 U.S.C.A., § 151-168 (R. 11).

II.

The Election

Following the foregoing decision, the Regional Director directed an election by secret ballot among the employees in the unit found to be appropriate (R. 129). While the direction of election referred only to an election by secret ballot, the director's "Notice of Election," respondent's exhibit 3 (R. 146), indicated that the election was to be con-

ducted by forwarding ballots by United States mail to the eligible employees at their home addresses. It is noted that exhibit 3 has not been reproduced in the record due to its size, but was considered by the Circuit Court and is included herein in Appendix G at page A37 for examination by the Court. In substance, this notice instructed the employee to consider himself in the same position as though in a voting booth in a normally conducted election. The employee was further instructed to mark his ballot without discussing it with anyone, fold the ballot and place it in the envelope addressed to the National Labor Relations Board. The employee was also instructed to sign his name on the outside of the envelope. The Board tacitly acknowledges that its own published rules do not provide for an election to be conducted by mail. § 102.69, Series 8, as amended (29 C.F.R. 102.69). The Board chooses to rely on its unpublished rules, customs or practices as set out in certain Board decisions (R. 132). While the Act specifically states that the Board shall certify the results of an election, 29 U.S.C.A., § 159(B), such certification was attempted by presenting a document to the respondent entitled "Certification on Conduct of Mail Election," respondent's exhibit 1 (R. 144). The alleged "certification" was nothing more than a purported waiver of all the respondent's objections to the conduct of the election.

Notwithstanding the respondent's attempt to enjoin the mailing of the ballots in an action entitled *Groendyke Transport, Inc., Plaintiff,* v. *Clyde F. Waers, Regional Director of the 27th Region of the National Labor Relations Board,* Civil Action No. 8670, filed in the United States District Court, Denver, Colorado; the Board proceeded to mail the ballots rather than follow the procedures outlined in its regulations.

A tally of the ballots returned by mail to the Board's office, indicated 14 votes were cast for the union and two votes were cast against the union (R. 130). The director then certified that a majority of ballots had been cast for the union. Respondent filed timely objections to the conduct of the election (R. 131; R. 137), but said objections were overruled without a hearing (R. 136). Respondent's Request for Review was likewise denied by the Board without a hearing.

III.

The Unfair Labor Practice Proceeding

For the purpose of testing the Board's determination that the aforementioned unit was appropriate and the Board's conduct of the election; respondent refused to bargain with the union as certified by the Board. In due course, an unfair labor practice charge was lodged against the respondent and the matter came on for hearing on December 1, 1964 (R. 15).

The trial examiner announced to the parties at the opening of the unfair labor practice proceeding that certain evidence would be rejected. His statement was as follows:

> "If the verbal proof that you want to introduce here is of the same nature as has been introduced in prior proceedings, and if you want to go into this mailing business, and all these matters which have been brought to the attention of the Regional Director, and upon which you have had an adverse decision, I must rule in conformity with our rules and regulations, that we don't take that evidence a second time." (R. 18).

This statement was made with the knowledge that respondent had never been afforded a hearing on his objections to the conduct of the election.

Respondent's counsel made the following offer of proof:

> ". . . Mr. Sutton is one of the employees of the respondent. He drives their transports. He will testify in substance that when he received his ballot by mail, he and his wife had been gone from home and returned home together. They found it in the mail box. They opened it together in the presence of his wife. They both read it. Mr. Sutton and his wife both read it and talked about it, and Mr. Sutton voted. We would not, of course, attempt to bring out how he voted. . . . We may have some other employee witnesses along the same line." (R. 19).

> Trial Examiner: ". . . I will reject the offer of proof and take the position consistent with my former ruling, that this already has been brought to the attention of the Board and *has been litigated*. . . . And of course, *I expect you will go to the Court one of these days, and that, of course, will place it where you will have the right to bring it all out.*" (R. 19).

The trial examiner apparently took the position that respondent's contentions had already been "litigated," even though respondent was never afforded a hearing on the objections to the Board's conduct of the election. It is further not clear as to what "Court" the examiner has reference to since it was in his "Court" that the respondent had its last chance to present its evidence.

Respondent then announced that it had issued a Subpoena Duces Tecum to F. L. Frisbey, supervising examiner of the Board, to produce the following documents pertaining to the election: Registered mail notices bearing form No. 3811 showing the signature of the person receiving the document and envelopes bearing the signatures of all parties voting in the election so that the signatures could be checked (General Counsel's Exhibit 3a, R. 142). General Counsel then introduced into evidence General Counsel's

Exhibit 3, which is a Petition to Revoke a Subpoena Duces Tecum which had been issued to F. L. Frisbey. The trial examiner summarily revoked the Subpoena Duces Tecum, stating:

> ". . . Now this would require the production of records which are really in the elective process of the Board and *I don't know as litigants or anyone else has the right to review or set in judgment as to whether the elective process of the Board has been carried forward properly.* So I think that these documents which are required to be produced . . . *falls well within the rule of being privileged documents.*" (R. 20).

The foregoing statement constitutes a novel application of law to an unfair labor practice proceeding as will be later demonstrated in respondent's argument.

The Board found petitioner had refused to bargain with the union and entered its order finding that petitioner had engaged in certain unfair labor practices (R. 14).

The petitioner refused to bargain collectively with the union for the purposes of testing the legality of the Board's rules. The Board then petitioned the United States Court of Appeals for the Tenth Circuit for a decree enforcing the Board's order. The Court of Appeals reversed and remanded the Board's finding concerning the appropriate unit, but affirmed the Board's finding dealing with the conduct of the representation election and the conduct of the unfair labor practice hearing.

Petitioner seeks a writ of certiorari to review that part of the decree entered by the United States Circuit Court of Appeals for the Tenth Circuit affirming the Board's findings dealing with the conduct of the representation election by mail and the conduct of the unfair labor practice hearing.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit has decided a case of first impression in a manner which is in conflict with the terms of the National Labor Relations Act, the rules of the Board and the Administrative Procedure Act. Petitioner respectfully submits that this case involves important questions in the administration of the foregoing federal acts and urges the Court to grant certiorari.

ARGUMENT AND AUTHORITIES

I.

The Board violated Section 9(c) of the National Labor Relations Act, 29 U.S.C.A., § 159(B), and its own rules, 29 C.F.R. 102.69, in conducting an election wherein ballots were distributed to the employees by United States mail.

The Circuit Court of Appeals stated in its opinion in this case,

> "We hold that the use of the mails is not per se an illegal procedure for conducting an election by secret ballot." (at p. 10).

In support of its opinion, the following cases were cited: *N.L.R.B.* v. *William J. Burns International Detective Agency, N.L.R.B.* v. *Summer Sand & Gravel Company,* 293 F.2d 754. In Burns and O. K. Van & Storage, the question was not raised on appeal. In the Summer Sand case, the question concerning the use of a mail ballot was raised on appeal but the Court held that the employer had waived the claim of error, by reason of the terms of the *consent* agreement for an election, wherein:

> ". . . the determination of the Regional Director upon any question procedural, or substantive, shall be final and binding."

The employer in this case did not sign a consent agreement for an election.

Respondent contends that the following statutory provisions are mandatory:

> ". . . If the Board finds upon the record of such hearings that such question of representation exists, *it shall direct an election by secret ballot and shall certify the results thereof.*"
>
> 29 U.S.C.A., § 159(B).

The court will note that the word "shall" appears twice in this phrase, emphasizing the mandatory duty of the Board.

> ". . . the word 'shall' is ordinarily imperative operating to impose a duty which may be enforced."
>
> ". . . the word 'may' when used in a statute is permissive only and operates to confer *discretion.*"
>
> 82 C.J.S., Statutes, § 379, p. 877.

The statute further contemplates a "secret ballot." "Secret" has been defined as follows:

> "SECRET. Concealed; hidden; not made public; particularly, in law, kept from the knowledge or notice of persons liable to be affected by the act, transaction, deed, or other thing spoken of."
>
> "Webster defines 'secrete' as 'to deposit in a place of hiding, to hide, to conceal; and defines the adjective "secret" as hidden, concealed;' and the noun as 'something *studiously concealed,* a thing kept from general knowledge, what is not revealed.' "
>
> "The Century Dictionary defines the verb 'secrete' as 'to make or keep secret, hide, conceal, *remove from observation, or the knowledge of others;*' and defines the adjective 'secret' as 'set or kept apart, hidden, con-

> cealed;' and the noun as 'something studiously hidden or concealed, a thing kept from general knowledge, what is not or should not be revealed.' "

Black's Law Dictionary, Fourth Edition, p. 1519.

Numerous Board decisions were cited by the Circuit Court of Appeals authorizing the conduct of elections by use of a mail ballot.

The Board is actually following an unwritten custom which evolved from the Board's decisions in *Alber's Super Markets, Inc.*, 61 N.L.R.B. 1101 (1945), and *Fedders Manufacturers Co.*, 7 N.L.R.B. 817 (1938). Both cases were decided prior to the 1947 amendment to the Act. Section 9 of the Act at that time read as follows:

> ". . . take a secret ballot of employees or utilize any other suitable method to ascertain such representation."

With such a broad grant of power to determine questions of representation, the Board was at liberty to formulate its own methods to determine the desires of a majority of the employees. The Labor-Management Relations Act of 1947 resulted from complaints that the Act did not afford the employer equal rights with unions. It has been stated:

> "This chapter, in view of its legislative history, manifests the purpose to equalize the National Labor Relations Act . . . so that it would no longer be one-sided. . . ."
>
> *United Packing House Workers of America* v. *Wilson & Company*, 80 F. Supp. 563, D.C. Ill.

Under 29 U.S.C.A., § 159(B), prior to the 1947 amendment, the Board was given a free hand in the matter of dealing with representation. From such a state of affairs evolved the rule that:

> "A National Labor Relations Board election is not the only method by which an employer may satisfy itself of a union's majority status. See *N.L.R.B.* v. *Bradford Dyeing Association*, 310 U.S. 318, 60 S. Ct. 918, 90 L. Ed. 155."

So, we find the Board determining questions of representations by the reviewing authorization cards secured by a union organizer. That such practices lend themselves to abuses is readily apparent. *In N.L.R.B.* v. *Peterson Bros., Inc.*, 342 F.2d 221, 5th Circuit, the court held:

> "We simply cannot accept, as based on substantial evidence, the Board's finding that it should be considered as authorization for the union for bargaining purposes. The card arrived by mail during the day at Simpson's house and during his absence his wife signed it and returned it by mail without Simpson's ever having read it and without ever having evidence that she read it. In fact, Simpson could not read and did not write his name well . . . . he repeatedly testified he was neutral toward the union and was neither for it or against it. . . . This, it seems to us, is not sufficient indication that he intended for his card to be used for any purpose, much less for authorization for the union's representing him as a bargaining agent."
>
> *N.L.R.B.* v. *Peterson Bros., Inc.*, 342 F.2d 221 (5 Cir. 1965).

Authorization cards secured by a paid union organizer are:

> ". . . by the Board's own admission . . . notoriously unreliable method of determining the majority status of the union. *Sunbeam Corp.*, 99 N.L.R.B. 546 (1952), *Midwest Piping & Supply Co., Inc.*, 63 N.L.R.B. 1060 (1945). . . . Moreover, it is beyond dispute that a secret election is more accurate reflection of the employees'

true desires than a check of authorization cards collected at the behest of a union organizer."

N.L.R.B. v. *Flomatic Corporation*, 347 F.2d 74 (2 Cir. 1965).

Respondent contends that the election conducted in this proceeding is no more reliable than tabulating authorization cards secured by a union organizer. The Board's certification in this proceeding (R. 136) was merely an empty formality.

"It is thus clear the most significant element of the remedy is not the formality of certification but an election . . . *and their proper safeguards, by which employees in 'the privacy and independence of* voting booths,' *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176, 99 L. Ed. 125, may freely register their choice whether or not they desire to be represented by the assisted union."

N.L.R.B. v. *District 50 UMW of A*, 355 U.S. 453, 78 S. Ct. 386, 2 L. Ed. 2d 401.

While this court has not ruled directly on this point, the foregoing decision contemplates election safeguards normally associated with elections.

Union elections by their very nature are conducted in an emotionally charged atmosphere, creating an opportunity for violations and excesses by both union and the employer. Congress empowered the Board to act as an impartial arbitrator to supervise such elections. It has been stated by employer groups that the Board has abdicated its role as a fair and impartial administrator of the National Labor Relations Act. In certain instances, the courts have shared this opinion.

". . . Finally, we are not persuaded by the Board's claim that if it must 'police' election campaigns, by which seemingly it means be required to look at something beyond a most patent outrage, it will be over-

come by further objection to certification. Arguments that tribunals are too busy to do their duty, *C. F. LaBuy* v. *Howes Leather Company*, 1957, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290, or that it is more expeditious not to recognize rights, or not agreeable ones. . . . If the Board tolerates low standards, that is where they will have to stop."

N.L.R.B. v. *Trancoa Chemical Corporation*, 303 F.2d 456 (1 Cir. 1962).

It will be noted that for reasons of expediency, the Board's rules contain detailed procedures for consent elections followed by various documents and procedures, all designed to waive statutory rights.

"We hold that the Board cannot free itself of its duty to conduct a fair election simply because a company and a union, for reasons best known to themselves, have come to terms on a pre-election agreement.

"The court has great respect for the National Labor Relations Board and its zealous, fairhanded administration of the Act. In this case, however, Board agents nodded when they should have been alert and active. *Individual rank and file employees, caught in the toils of selfish company union machinations or in the complexities of honest company-union negotiations, are entitled to look to the Board for protection of their rights.*"

Shoreline Enterprises of America v. *N.L.R.B.*, 262 F.2d 933 (5 Cir. 1959).

In answer to petitioner's foregoing contentions, the intervenor argued before the Circuit Court of Appeals that "the right to secrecy of the ballot, of course, is generally considered to be a personal one which may be waived by the voter." A short answer to this contention can be found in *N.L.R.B.* v. *Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10 Cir. 1964). The court held:

"The Board sustained the voiding of the other ballot signed by a blind worker. In accordance with § 9(c) of the Act, the Regional Director ordered an election by secret ballot. The signing of the ballot identified the voter and violated the rule of secrecy. The respondent argues, however, that the veil of secrecy is personal to the voter; and, that the signing of the name lifted the veil. It is argued moreover that the challenge procedure involuntarily destroyed the secrecy of the ballot; and, that the rule falls with reason therefore. *The short and conclusive answer is that the Board and not the voters prescribed the rules for the conducted election, and all voters must abide by the rules.* The identification of the voter voided the ballot by operations rule itself, and the Board had no power to give it any validity. See *N.L.R.B.* v. *National Truck & Rental Company*, 239 F.2d 422, and *Semi-Steel Casting Company of St. Louis* v. *N.L.R.B.*, 160 F.2d 388, certiorari denied, 332 U.S. 758, 68 S. Ct. 57, 92 L. Ed. 344."

N.L.R.B. v. *Ideal Laundry & Dry Cleaning Co.*, 330 F.2d 712 (10 Cir. 1964).

This case is in accord with the general rule that:

"National Labor Relations Board must comply with its own statements of procedure. . . ."

Madden v. *International Organization, Inc.*, 259 F.2d 312, cert. denied, 358 U.S. 909, 79 S. Ct. 236, 3 L. Ed. 2d 230.

Respondent submits that the Board's certification of the union in this proceeding was a nullity and should be set aside.

II.

Neither the Administrative Procedure Act, Title 5, U.S.C.A., § 1002, nor the Rules and Regulations of the National Labor Relations Board permit a Regional Director in the exercise of his discretion to conduct an election by mail ballot.

The Circuit Court of Appeals in its opinion, at page 9, makes this statement:

> "Neither the statute nor the regulation expressly or impliedly forbids the conduct of an election by mail so long as the mandate for secrecy is vouchsafed. The Board is undoubtedly empowered to prescribe reasonable rules for the conduct of an election by secret ballot."

The National Labor Relations Act grants to the Board the power to promulgate rules and regulations. This grant of authority is circumscribed by statute, however, in that:

> "The Board shall have authority from time to time to make, amend and rescind, *in the manner prescribed by the Administrative Procedure Act*, such rules and regulations as may be necessary to carry out the provisions of this subchapter."
>
> 29 U.S.C.A., § 156.

It is thus apparent that the Board's rules are subject to the provisions of the Administrative Procedure Act, Title 5, U.S.C.A. § 1002 (a). This section provides for a reasonable check on the authority of an administrative agency. The pertinent portions are set out in Appendix E herein.

The Board has published certain regulations pertaining to the conduct of elections. The pertinent portions thereof are attached hereto in Appendix H, page A39.

A significant statement is contained in § 101.19, namely:

> "(2) The actual polling is always conducted and supervised by Board agents."

These regulations contemplate Board *supervision* over the actual polling of ballots not the mere counting of ballots which have been returned by mail. In this proceeding, there was no supervision over the polling of the ballots.

In Appendix G, page A37, respondent has reproduced the Notice of Election which was filed as an exhibit in this case, but considered too large to reproduce. On one portion of the Notice, respondent is granted certain valuable rights, namely:

> "Each of the interested parties may designate an equal number of observers. . . . These *observers will (a) act as checkers at the voting place and at the counting of ballots, (b) assist in the identification of voters. . . .*"

In contrast to rules of procedure printed on the left side of the Notice, it will be observed that on the opposite side of the Notice it is stated:

> "The election will be conducted by mail ballots. Ballots will be mailed at 5:00 p.m. on July 6, 1964, to voters at their home addresses."

Respondent will admit that if the Board had published rules authorizing an election to be held by mail ballot with appropriate safeguards insuring secrecy and the integrity of the actual polling, then such regulations would comply with the Administrative Procedure Act.

The Board, with commendable candor, has admitted that no such procedures relating to the conduct of an election by mail have been promulgated and filed in the Federal Register as required by the Administrative Proce-

dure Act. Respondent submits that the Board does not have the "discretion" to enforce an unpublished rule in contravention of a published rule. Respondent will further admit that the Board has directed elections by mail pursuant to its practices and customs, none of which have ever been clearly defined or published in the Federal Register. This practice has not received specific court approval, nor has it been expressly condemned. It would appear to the Respondent that the Administrative Procedure Act was designed to eliminate such practices and its attendant "gray" areas of controversy.

> ". . . no person shall *in any manner* be required to resort to organization or *procedure* not so published."
>
> Title 5, U.S.C.A., § 1002.

It is interesting to observe the Board's treatment of a violation of one of its published rules. Thus, where an employer failed to file its objections to an election within 5 days as required by the Board rule, the employer lost its right of appellate review. *N.L.R.B.* v. *Conlon Bros. Mfg. Co.*, 187 F.2d 329. Respondent seeks only a fair enforcement of the Board's published rules and submits that it is not bound by any unpublished rule of procedure which can be changed at the pleasure of the Board. In short, the Board should be bound by its own published rules as are the parties. *Madden* v. *International Organization, Inc.*, 259 F.2d 312, cert. denied, 358 U.S. 909, 79 S. Ct. 236, 3 L. Ed. 230.

III.

Petitioner was denied the right to introduce material evidence in violation of the due process clause of the Fifth Amendment to the United States Constitution.

The procedural aspects involved in handling a case before the Board have given the courts and Congress cause for concern.

> "As enacted originally, Section 10(b) of the National Labor Relations Act provided that 'the rules of evidence prevailing in courts of law or equity shall not be controlling' in proceedings before a trial examiner. This broad grant of discretion and lack of judicial control over evidence rulings of trial examiners and the Board, led Congress to amend the statute in 1947 so as to require the Board to follow the rules of evidence prevailing in Federal Courts. § 10(b) of the Act now provides: 'Any such proceedings shall as far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States, adopted by the Supreme Court of the United States, pursuant to § 2072 of Title 28. . . '."
>
> *N.L.R.B.* v. *Capitol Fish Company*, 294 F.2d 868 (1961).

While an unfair labor practice proceeding is an administrative hearing, the parties are still afforded protection under the Fifth Amendment to the Constitution and the foregoing statute:

> "No special characteristics of an administrative hearing justify the exclusion of evidence which it would be error to exclude in a court trial. . . ."
>
> *N.L.R.B.* v. *Capitol Fish Company*, supra.

This statement of the law is in accordance with the court's decision in *N.L.R.B.* v. *Ideal Laundry & Dry Cleaning Company*, 330 F.2d 712 (1964), wherein it was stated:

"While the Board may, in the exercise of its administrative discretion deny an opportunity for hearing in the representation proceedings on evidence elicited by a post-election investigation, *respondent is entitled to produce in this unfair labor practice proceedings any additional, relevant evidence bearing on the critical issue.*" (At p. 716).

See also *N.L.R.B.* v. *Portland Cement Co.*, 336 F.2d 117 (10 Cir. 1964)

The respondent in this case attempted to offer evidence tending to show the circumstances under which the ballots were voted (R. 18, 19). Respondent counsel indicated he did not intend to inquire as to manner in which the employee marked his ballots. This evidence was excluded (R. 19).

Under the Federal Rules of Civil Procedure:

"A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer . . . which is an adverse party and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party. . . ."

Rule 43(b).

This rule aids the trier of the facts in ascertaining the truth on a particular issue. The Board in such proceedings apparently takes a different view of the scope of the inquiry. The Board, by its own rules, has greatly limited the right of a respondent to inquire into the facts by summoning adverse witnesses and those employees of the Board who have relevant evidence in their possession. The trial examiner in this proceeding revoked the subpoena duces tecum issued to an employee of the Board (R. 20), on the grounds that no litigant "has a right to review or to sit in judgment as to whether the elective process of

the Board have been carried forward properly . . . . this particular subpoena falls well within the rule of being privileged documents." (R. 20).

Such a ruling is not in harmony with the court's view of an unfair labor practice hearing. In *General Engineering, Inc.*, v. *N.L.R.B.*, 341 F.2d 367 (1965), 9th Cir., it was held:

> ". . . we believe that the claim must be particularized with reference to some generally recognized privilege accorded governmental agencies. Such, for example, are claims that the information would disclose confidential informants—state secrets—military secrets—or mental processes of those engaged in investigative or decisional functions. . . . In the proceeding now before us, no such privilege was either claimed or found to exist."
>
> * * *
>
> "We, therefore, hold that § 102.118 of the Board's rules and regulations was invalidly applied. . . . Cross petition to enforce denied."

Apart from any technical analysis of the problem, our system of justice should not permit the trial examiner of an agency to be the sole authority to rule upon that agency's claim of privilege and immunity from judicial inquiry.

> "This case presents an anomaly in our system of justice. The agency official charged with responsibility for asserting the claim of privilege is also the prosecutor whose successful prosecution of this case could depend on the exclusion of the evidence for which the privilege is claimed. . . . Impartiality is the life of justice. . . . Responsibility for deciding the question of privilege properly lies in an impartial independent ju-

diciary—not in the party claiming the privilege and not in a party litigant."

N.L.R.B. v. *Capitol Fish Company*, supra.

The trial examiner ruling in the unfair labor proceeding in this case in substance advised the respondent that it could not inquire into the manner in which this election was conducted. It is, indeed, a startling legal concept, alien to the adversary system of justice, that a party is foreclosed from inquiry into any relevant issue in the case.

Even assuming that there are peculiar considerations in an unfair labor practice proceeding that call for a departure from district court rules, the Board is still bound by the provisions of the Administrative Procedure Act.

"The Administrative Procedure Act was framed against the background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It creates safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

"Thus, § 3(a) of the Act requires every agency to which it applies, which includes Federal Trade Commission, to publish in the Federal Register certain statements of its rules, organization and procedure, including the nature and requirements of all formal or informal procedures available and *adds that, no person shall in any manner be required to resort to organization or* procedure not so published. In addition, § 6(b) proscribes any requirement of a report or other investi-

gated demand in any manner or for any person except as authorized by law."

United States v. *Morton Salt Company*, 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

Title 5, U.S.C.A., § 1002.

Respondent submits that it was not bound to accept the ruling of the Board that the election would be conducted by mail ballot in direct violation of the Administrative Procedure Act.

Petitioner cites rulings from cases where it was held generally that if there is no substantial issue of fact, no formal hearing was necessary.

In the conduct of an unfair labor practice hearing, there are, generally, no pre-trial conferences or pre-trial orders in which issues of fact can be segregated. In many instances, the available evidence must be produced through employee witnesses, both friendly and adverse, and Board employees. Since, in this proceeding, the Board did not follow its own rules, respondent should have had the right to inquire into possible violations of those rules which would have influenced the free choice of the employee. In any event:

"The fact that a judgment may be justified on the merits does not obviate the requirement of a fair hearing. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093, *Inland Steel* v. *N.L.R.B.*, 7 Cir., 109 F.2d 9."

N.L.R.B. v. *Bryan Manufacturing Co.*, 196 F.2d 477, (7 Cir. 1952).

The Circuit Court in this case disposed of the foregoing arguments summarily, stating:

"In the absence of some showing of the unavailability of the evidence justifying non-compliance with § 102.69(a), we will not notice it here." (At p. 13).

This statement fails to recognize that petitioner's request for a hearing on its post-election objections was denied. The Circuit Court's statement would appear to indicate that an employer must produce his evidence by affidavit and undergo a preliminary "trial by affidavit" as a condition precedent to be granted the right to a hearing. Such a rule fails to recognize that hostile witnesses will not voluntarily give affidavits. It would indeed be a strange rule of procedure if the federal district courts would require an affidavit from a hostile witness as condition precedent to subpoenaing such a witness to testify in court.

The decision of the Circuit Court in this case separates the issue of the appropriate unit from those raised in post-election objections; remanding the case for a further hearing on the appropriate unit question. Petitioner respectfully submits that this case cannot be subdivided in that manner. A further hearing with respect to the appropriateness of the bargaining unit should take into consideration the desires of employees currently employed by petitioner with respect to their inclusion in the bargaining unit. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 61 S. Ct. 908, 85 L. Ed. 1251.

> "Indeed, it may be the single factor that would 'tip the scales', *N.L.R.B.* v. *Underwood Machinery Company*, 179 F.2d 118, *N.L.R.B.* v. *Botany Worsted Mills*, 133 F.2d 876, *N.L.R.B.* v. *Ideal Laundry & Dry Cleaning Company*, 330 F.2d 712."

Similarly:

> "*Consideration, however, should also be given to the consequences to employees similarly situated who apparently do not wish to unionize, but who would inevitably be affected, basically, by the union's activities.* It is only if it is reasonable to regard the employees elsewhere in the chain differently in the light

> of the total circumstances that there is a true majority vote. *We believe, also, that there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization.* Congress' appreciation of these factors we believe is evidenced by its passage of § 9(c)(5) of the effect that the extent of organization is not the sole consideration."
>
> *N.L.R.B.* v. *Purity Food Stores, Inc.*, 354 F. 2d 926.

By reason of transfers and normal attrition, the majority of those employees indicating their approval of the bargaining unit in the prior proceeding are not currently employed by petitioner. Thus, one important factor in the determination of the appropriateness of the bargaining unit cannot be properly adjudicated on remand. Petitioner contends that all the foregoing issues and questions raised in this case are inter-related and cannot be dealt with on a piecemeal basis.

CONCLUSION

Petitioner submits that by reason of the errors cited herein, the Board's order should not be enforced. In the alternative, petitioner suggests the case be remanded to the Board for a further hearing on all questions presented herein. If the unit is found to be appropriate, then the Board should be ordered to conduct an election by secret ballot in conformity with the relevant statute and the Board rules.

Respectfully submitted,

PAYNE H. RATNER
Attorney for Petitioner,
Groendyke Transport,
Inc.

APPENDIX A

Trial Examiner's Decision

STATEMENT OF THE CASE

This proceeding, with the parties represented by counsel above named, was heard by the Trial Examiner at Denver, Colorado, on December 1, 1964, on complaint of the General Counsel and answer of the Respondent. The issue litigated was whether the Respondent had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union above named.

At the hearing the parties were afforded full opportunity to present evidence, examine and cross-examine witnesses and to present oral arguments and briefs.

Upon the entire record I hereby make the following:

Findings and Conclusions

I. The business of the Company

It is undisputed, and I find, upon the entire record herein, that the Respondent is a corporation duly organized under the laws of the State of Oklahoma with its principal office and place of business at Enid, Oklahoma.

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1. In this decision, Groendyke Transport, Inc., is referred to as the Respondent or the Company; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 961, as the Union; the National Labor Relations Board as the Board; the General Counsel of the Board and his representative at the hearing, as the General Counsel; and the Labor Management Relations Act, as amended, as the Act.

The original charge in this proceeding was filed on September 14, 1964, by a representative of the Union and the complaint was issued by the Regional Director, Twenty-seventh Region, Denver, Colorado, on October 5, 1964.

At all times material herein, it has been engaged in the commercial transportation by truck of petroleum, petroleum products and other related materials. In the course and conduct of its business operations, it transports petroleum products across state lines in an annual amount exceeding $50,000.

I find that the Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. The labor organization

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. The representation proceeding

It is undisputed that the present unfair labor practice proceeding grows out of a prior representation proceeding before the Board, entitled "Groendyke Transport, Inc., Employer and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 961, Petitioner, Case No. 27-RC-2613." The representation proceeding was initiated by a petition duly filed by the Union. Thereafter, a hearing was held and the Board, on June 9, 1964, by Clyde F. Waers, Regional Director, Twenty-seventh Region, issued a Decision and Direction of Election, which found that the following employees of the Respondent constituted a unit appropriate for the purposes of collective bargaining:

All truck drivers employed by the employer at its Denver, Colorado, terminal but excluding all other employees, guards, watchmen and supervisors as defined in the Act.

The Decision and Direction of Election noted that at the hearing in the representation case, the Company had contended that a single terminal unit of its employees was inappropriate and that the only appropriate unit would be a systemwide unit of all truckdrivers at the Company's 29 terminals located in the States of Oklahoma, Texas, Colorado, Kansas and New Mexico. The Decision and Direction of Election also noted other contentions of the Company which were dismissed.

Shortly after issuance of the aforesaid Decision and Direction of Election, the Company requested that the Board review the Decision and Direction of Election. This request was denied by the Board.

It is undisputed that, thereafter, the Regional Director, Twenty-seventh Region, conducted an election by mailed ballot of the employees in the unit described as appropriate. The Regional Director determined that the election would be conducted by mailed ballot because the truckdrivers involved were engaged in round-the-clock operations. On August 3, 1964, the Regional Director issued a tally of ballots which demonstrated that the Union had won the election.

Thereafter, on August 6, 1964, the Company filed timely objections to conduct affecting the results of the election and, pursuant to the Board's Rules and Regulations, the Regional Director investigated the objections. On September 2, 1964, the Regional Director, Twenty-seventh Region, issued a Supplemental Decision on Objections and Certification of Representatives. In this decision, he reviewed the various objections and found them to be without merit and issued a Certification of Representatives to the Union covering the employees in the unit of employees previously set forth.

It is undisputed that, thereafter, the Company refused to bargain with the Union on the ground that the unit found to be appropriate in the Decision and Direction of Election dated June 9, 1964, was not in fact an appropriate unit and on the ground that the election conducted in the unit by mailed ballot was not a secret election in conformity with the Rules and Regulations of the Board. In the instant unfair labor practice proceeding, counsel for the Company seeks a review by the Board of his various contentions on those points.

The Instant Proceeding

At the hearing herein, counsel for the General Counsel and counsel for the Company outlined their respective positions in regard to the issues herein. Briefly, the General Counsel took the position that all action taken in the representation proceeding had been in accordance with the Board's Rules and Regulations and was in conformity with law. Counsel for the Company stated that he contended that the unit deemed appropriate was not in fact appropriate and that the mailed ballot was not a secret ballot and was therefore not in accordance with the Board's Rules and Regulations.

The General Counsel then introduced into evidence the transcript of testimony in the representation case, together with pertinent exhibits, the Decision and Direction of Election previously mentioned and the Objections and the Regional Director's Supplemental Decision on Objections, and other pertinent documents. The General Counsel then rested his case with the statement that the contentions proposed in the instant hearing by the Company had been fully litigated in the representation proceeding and, having been once heard and decided by the Board, they could not be litigated a second time in this unfair labor practice proceeding. The Trial Examiner then suggested to all counsel

that counsel for the Company proceed to offer in evidence such proof as he desired, and that upon appropriate objection the Trial Examiner would rule as to the admissibility of the evidence; in the event his ruling was adverse to counsel for the Respondent, that he would permit an offer of proof which would explicate the nature of the testimony sought to be introduced into evidence, so that the Board might see the nature of the testimony deemed inadmissible. This procedure was acceptable to counsel and thereafter was followed.

Counsel for the company made the following offers of proof pursuant to this arrangement:

(1) Counsel for the Company offered to prove, by a witness named Billy Gene Sutton, Aurora, Colorado, that he received his ballot by mail; that Sutton and his wife found the ballot in their mail box and that they opened it together and that both read the ballot. Sutton then marked his ballot in the presence of his wife and his wife saw how he voted. One of them then sealed the ballot and mailed it to the Regional Director.

Counsel for the General Counsel objected to the reception of this testimony on the ground that Respondent's contention that the ballot was not secret had been considered as an Objection to the conduct of election and had been dismissed. The Trial Examiner sustained the objection.

(2) Counsel for the Company then offered into evidence the Certification On Conduct of Mail Election issued by the Regional Director, Twenty-seventh Region, and the Notice of Election in the representation proceeding. He also introduced into evidence a copy of Instructions to Election Observers issued by the Board. These documents were received in evidence over objection of the General Counsel.

(3) Counsel for the Company then sought to introduce into evidence the transcript of testimony in Case No. 16-RC-597, entitled, "In the Matter of Groendyke Transport, Inc. and General Drivers, Chauffeurs and Helpers Local Union 886, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL." The hearing in this case was held at Oklahoma City, Oklahoma, on November 14, 1950. Counsel for the Company contended that in the 1950 case, the Board had passed on the same unit question as was involved in the later representation proceeding and that the transcript in the 1950 case and the Board's decision on the evidence therein supported the position of the Company in this proceeding.

The General Counsel objected to the admission of this evidence on the grounds of relevancy and materiality. The Trial Examiner sustained the objection and pointed out that the transcript in the 1950 proceeding and the Board's decision thereon were extremely remote as to the issue herein.

(4) Counsel for the Company then sought to call as a witness F. P. Frisbey, supervising examiner for the Board. A subpoena duces tecum had been directed to Mr. Frisbey directing him to produce certain registered mail receipts showing the signature of persons receiving the mailed ballots, which counsel claimed would show that in many instances, wives or other members of the family had signed receipts for ballots directed to the employees. The General Counsel thereupon requested that the Trial Examiner revoke the subpoena issued to Frisbey on the ground that the Company had not complied with the Board's Rules and Regulations, Section 102.118. This section prohibits any employee of the Board from producing any files, records, etc., or from testifying in regard to them, except with

permission of the General Counsel, which had not been requested by the Company or obtained. The General Counsel also pointed out that that the procedure used in connection with the election had been fully litigated in the representation proceeding. The Trial Examiner thereupon ruled that, pursuant to the Board's Rules and Regulations, the subpoena was revoked. Thereupon the Respondent rested its case.

Concluding Findings

Upon a consideration of the entire record herein, it is found that there is, in this proceeding, no new evidence which would require a redefinition of the appropriate unit herein or a setting aside of the election conducted by mailed ballot by the Regional Director, Twenty-seventh Region. Inasmuch as the Company concedes that it has refused to bargain with the Union on the basis of its legal contentions, the Trial Examiner has no recourse but to find that the Company has refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the Act as alleged in the complaint.

IV. The effect of the unfair labor practices upon commerce

The activities of the Company set forth in Section III, above, occurring in connection with the operations of the Company described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Company has engaged in certain unfair labor practices, it will be recommended that the Company cease and desist therefrom and take certain af-

firmative action designed to effectuate the policies of the Act.

Also having found that the Union represented, and now represents, a majority of the employees in the appropriate unit, and that the Company has refused to bargain collectively with it, the undersigned will recommend that the Company, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 961 is a labor organization within the meaning of Section 2(5) of the Act.

2. Groendyke Transport, Inc. is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

3. All truckdrivers of the Company employed at its Denver, Colorado, terminal but excluding all other employees, guards, watchmen and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union was on August 3, 1964, and at all times thereafter has been and is, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 2, 1964, and at all times thereafter, to bargain collectively with the Union

as the exclusive representative of all its employees in the aforesaid appropriate unit, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act, as amended.

6. By the aforesaid refusal to bargain, the Company has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act, as amended.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that Groendyke Transport, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit found above.

(b) In any other manner interfering with the efforts of the Union to bargain collectively with it in behalf of the employees in the aforesaid appropriate unit.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit with respect to

wages, rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its business place at Denver, Colorado, copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by the Company's representative, be posted by the Company immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twenty-seventh Region, in writing, within 20 days from the date of receipt of this decision what steps the Respondent has taken to comply herewith.[3]

It is further recommended that, unless on or before 20 days from the date of receipt of this decision the Respondent notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National

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2. In the event that these Recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree Of The United States Court Of Appeals Enforcing An Order" shall be substituted for the words "A Decision And Order."

3. In the event that these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated: May 12, 1965.

David F. Doyle
Trial Examiner

Appendix

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act we hereby notify our employees that:

We Will bargain collectively upon request with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 961, as the exclusive representative of all employees in the bargaining unit described herein, with respect to wages, rates of pay, hours of employment, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All truckdrivers employed by us at our Denver, Colorado, terminal but excluding all other employees, guards, watchmen and supervisors as defined in the Act.

We Will Not in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

Groendyke Transport, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

Decision and Order.

On May 12, 1965, Trial Examiner David F. Doyle issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusion, and recommendations of the Trial Examiner.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Groendyke Transport, Inc., Enid, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. Sep 8 1965

John H. Fanning Member
Gerald A. Brown Member
Howard Jenkins, Jr. Member
National Labor Relations Board

APPENDIX B

Regional Director's Supplemental Decision on Objections and Certification of Representatives

Pursuant to a Decision and Direction of Election issued by the Regional Director for the Twenty-Seventh Region on June 9, 1964, an election by secret ballot was conducted under the direction and supervision of the undersigned on August 3, 1964. Upon conclusion of the election, the undersigned caused to be furnished to the parties a Tally of Ballots which showed the following:

Approximate number of eligible voters	24
Void ballots	1
Votes cast for Petitioner	14
Votes cast against participating labor organization	2
Valid votes counted	16
Challenged ballots	8
Valid votes counted plus challenged ballots	24

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for Petitioner.

Thereafter, on August 6, 1964, the Employer filed timely objections to conduct affecting the results of the election, a copy of which has been served on the Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, the undersigned has carefully investigated the objections and hereby reports as follows:

The Objections

The objections upon which the Employer bases its request that the election be set aside are in substance as follows:

I. "The aforesaid election was conducted by mail and not in conformity with the National Labor Relations Board Regulations and the Board's Notice of Election."

Certain specific procedures contained in the Board's standard Notice of Election are cited in the Employer's objections, and it is alleged that no attempt was made to comply with the said procedures. The procedures cited are those which apply to a manual election rather than to a mail ballot election.

II. By reason of conducting said election by mail, certain instructions to election observers normally issued by the National Labor Relations Board in a manual election could not be followed.

III. "As a result of the lack of supervision in the conduct of this election, each eligible voter did not have a fair and equal chance to express himself freely and in secret. In fact, in at least one instance an employee prepared his ballot in the presence of two other employees."

IV. "There is no assurance by affidavit or other certificate that the named eligible voter did in fact receive a ballot, personally voted said ballot in secret, and personally mailed said ballot to the Director."

V. "The employer reasserts its objection that the unit selected by petitioner was not appropriate for the purposes of collective bargaining and incorporates by reference Employer's Petition for Review in support of said objection."

VI. "The order of the Director directing an election by mail contravenes Sec. 9 of the National Labor Relations Act, 29 U.S.C.A. Sec. 159(b)."

VII. "The order of the Director directing an election contravenes Sec. 9(c)(5) of the National Labor Relations Act, 29 U.S.C.A. Sec. 159(B)(5)."

VIII. "The arbitrary and capricious actions of the Director in the handling of this representative proceeding in its entirety, wholly disregarded the statutory mandates indicated above; and violated the due process clause of the Fifth Amendment of the Constitution of the United States."

"Wherefore, by reason of the foregoing, the Employer herein cannot agree that all precautions in the interest of a fair and secret vote were taken, that the envelopes containing the Secret Ballot were properly identified, that they were opened in presence of its observer, that the secrecy of the ballots was maintained, or that the counting was fairly and accurately done."

All of the objections set forth in Paragraph I above are founded upon the fact that the election was conducted by mail and that certain rules or procedures set forth in the Board's Notice of Election were not conformed with. The procedures cited by the Employer of having a designated polling place, having a Board agent hand the ballots to the voters, having the voters mark their ballots in a voting booth, and having them deposit the ballots in a ballot box are, of course, intended to apply to a manual election rather than to one conducted by mail ballots.

The Notice of Election in this case clearly stated that the election would be conducted by mail ballots, and it gave full information as to when the ballots would be mailed to the voters' homes, when they were to be returned to the Board offices, and when and where the ballots were

to be counted. Separate individual notices were mailed to each eligible voter with his ballot which gave complete instructions with regard to casting his ballot by mail.

In a long line of cases[1] the Board has held that the Regional Director has broad discretion in determining the method by which elections shall be conducted, and may, in the exercise of his discretion, conduct an election by mail ballot where he believes such method to be most suitable. Prior to announcing that balloting would be by mail in this instance, the availability of the voters for a manual election was carefully checked. Investigation disclosed that the truck drivers who were to vote in the election could not be scheduled to vote at any single location within a reasonable period of time, such as not to exceed two or three hours. The undersigned thereupon concluded that in the interest of giving each eligible voter full opportunity to vote, with the least inconvenience to the voters and the Employer, the election should be conducted by mail.

On July 6, 1964, the date on which the ballots were to be mailed to the employees, the Employer filed a petition for a temporary restraining order in the U. S. District Court in Denver, Colorado. The petition, in essence, sought to restrain the mailing of ballots. The Court entered a temporary restraining order but, with the Court's approval, the parties entered into a stipulation providing for the mailing of the ballots as scheduled and for the impounding of said ballots upon their return by the voters until a decision on the Employer's petition for injunctive relief was issued by the Court.

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1. Harold F. Gross d/b/a Southwestern Michigan Broadcasting Co., 94 NLRB 30; Pacific Gas & Electric Co., 89 NLRB 938; F. W. Woolworth Co., 96 NLRB 380; Continental Bus System, Inc., 104 NLRB 599; Shipowners Association of the Pacific Coast, 110 NLRB 479; and National Van Lines, 120 NLRB 1343.

On July 24 the Court heard the matter on the Employer's request for a preliminary injunction. The preliminary injunction was denied and the court dissolved the temporary restraining order which had previously been entered. This action was subsequently dismissed.

In view of the above, and in the absence of any evidence to show that the undersigned abused his discretion by conducting the election by mail ballots, I find no merit to those portions of the objections based on the use of the mail ballot procedure.

It is alleged in a part of Paragraph I of the objections that no attempt was made to comply with the "directive" concerning the use of observers by the parties to act as checkers at the voting place and at the counting of ballots, to assist in the identification of voters, or to challenge voters and ballots.

Investigation has disclosed that the unopened envelopes containing the marked ballots of all voters were assembled in the Board's office at 10:00 A.M. on August 3, 1964, preparatory to counting in accordance with instructions given to the parties. Payne H. Ratner, Counsel for the Employer, was present as the Employer's observer; Edward R. Toliver, as the Petitioner's observer; and two Board agents. Before any of the envelopes were opened, Ratner and Toliver checked off the names of the voters on the eligibility list as the envelopes were identified. The envelopes were laid in front of the two observers one at a time, calling off the names and allowing them to examine the signatures on the envelopes.

The employer's observer then challenged three voters' ballots on the grounds that these individuals had been terminated before the date of the count, and the Petitioner's observer challenged five voters' ballots. The name stubs

on the envelopes of the remaining unchallenged ballots were then detached, the ballots were removed from the envelopes in the presence of the observers and, without unfolding, were dropped into a basket and mixed together. The ballots were then dumped on a table where they were unfolded, laid face up in front of the observers and counted.

The above-stated facts demonstrate that contrary to the Employer's objections, both parties did have observers to act as checkers at the counting of the ballots. The observers assisted in the identification of voters, and they had an opportunity to and did challenge the ballots of several voters.

In view of the foregoing, I find no merit to the Employer's contentions cited in that part of Paragraph I of the objections.

Further contentions set forth in Paragraph I of the objections relate to certain rules for the eligibility of voters which are set forth in the standard Notice of Election which it is alleged were not complied with. On July 7 a list of the names and addresses of all individuals to whom ballots were mailed was furnished to Counsel for the Employer. He was informed in writing of his right to challenge the ballot of anyone on the list whom he did not consider to be eligible to vote, and he exercised that right at the time the ballots were counted, as described above. I therefore find no merit to this portion of the objections.

The objections set forth in Paragraph II above allege that, because the election was conducted by mail, certain instructions to observers could not be given. Most of the instructions cited are applicable to the conduct of observers in a manual election and have no possible application or any meaning or purpose with respect to a mail election.

Those instructions which had applicability to a mail election, such as identifying and checking off the names of the voters, were carefully followed by the observers, as set forth above. I, therefore, find no merit to this portion of the objections.

In Paragraph III of the objections the Employer contends that each eligible voter did not have a fair and equal chance to express himself freely and in secret. It is further alleged that in at least one instance an employee prepared his ballot in the presence of two other employees.

In accordance with established Board procedure in mail elections, ballots were mailed directly to employees' homes in all cases where the Employer furnished their home addresses, as had been requested.[2] Detailed instructions were sent with the ballots as to marking them in secret, sealing them in the return envelopes provided, and putting them in the mail without discussion with anyone. Those individuals had every opportunity to mark their ballots in secret, and there has been no evidence adduced to show that they did otherwise.

Investigation has disclosed that the employee whom the Employer alleges prepared his ballot in the presence of two other employees received his ballot in the sealed envelope in which it was mailed. He had full opportunity to take the envelope to his home or any place else of his own choosing to mark his ballot in secrecy if he so desired. He chose instead to open the envelope and mark his ballot at his desk in the Company's offices. After marking it, he personally sealed it in the envelope provided to return it

2. Ballots were mailed to two employees whose names were not included on the eligibility list submitted by the Employer, one of whom had been found to be an eligible voter in the Decision and Direction of Election and the other having been named to be allowed to vote subject to challenge. Since the Regional Office was unable to obtain these employees' home addresses from the parties or other sources, their ballots were mailed to them in care of the Employer's Denver Terminal.

to the Board and placed it in an outgoing mail basket along with other regular mail.

There has been no evidence adduced to show that anyone else saw how he marked his ballot or that the secrecy of the balloting was in any way impaired or violated. I therefore find no merit to this portion of the objections.

The objections raised in Paragraph IV have been answered in the discussion immediately above and, for the reasons set forth therein, are likewise found to be without merit.

In Paragraph V of the objections the Employer contests the appropriateness of the unit involved herein. That issue was previously litigated in accordance with the Board's Rules and Regulations and the appropriate unit was defined in the Decision and Direction of Election issued by the undersigned on June 9, 1964. The Employer requested review of that Decision and Direction of Election by the Board, and on June 29 the Board denied the request for review.

Pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8, denial of a request for review by the Board constitutes an affirmance of the Regional Director's action and precludes relitigation of the issues involved. Therefore, this portion of the objections cannot properly be given further consideration at this time.

The issues raised in Paragraphs VI, VII, and VIII of the Employer's objections I find to all be without merit, since the actions complained of are all permissible within the discretion allowed a Regional Director in conducting an election by mail ballots, as set forth above.

Conclusions and Determination

On the basis of the foregoing, the undersigned finds and determines that all of the Employer's objections are without merit and are hereby overruled.

Certification of Representatives

Pursuant to the authority vested in the undersigned by the National Labor Relations Board, it is hereby certified that a majority of the valid ballots has been cast for the Petitioner and such organization is the exclusive representative of the employees in the unit herein involved within the meaning of *Sections* 9(a) of the National Labor Relations Act.

Signed at Denver, Colorado, this 2nd day of September, 1964.

Clyde F. Waers
Regional Director
National Labor Relations Board
Twenty-Seventh Region
609 Railway Exchange Building
Seventeenth and Champa Streets
Denver, Colorado 80202

(Seal)

APPENDIX C

"National Labor Relations Board, Petitioner, v. Groendyke Transport, Inc., Respondent,

"International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 961, Intervenors.

No. 8571.

"United States Court of Appeals Tenth Circuit.

Jan. 20, 1967.

"Rehearing Denied March 1, 1967.

"Proceeding on petition for enforcement of an order of NLRB to bargain with duly elected and certified representative of employees. The Court of Appeals, Murrah, Chief Judge, held, inter alia, that it was incumbent upon NLRB to articulate reasons for its apparently inconsistent findings in two cases involving operations of same motor common carrier employer where in the first proceedings a three-terminal unit was deemed to be inappropriate and Board apparently could find no local autonomy, while in subsequent proceedings Board found one terminal appropriate and also found local autonomy with supervisory powers in terminal manager to make work assignments, discipline, reprimand and effectively recommend discharge of terminal drivers.

"Remanded for further consideration.

"1. Labor Relations Key 205

"In representation proceedings, on issue as to whether or not truck drivers at one of employer's terminals were an appropriate bargaining unit, although there were sev-

eral factors tending to show that a system wide unit as proposed by employer could be appropriate, question was whether such factors were so compelling as to require a finding that such unit was the only appropriate one. National Labor Relations Act, §§ 8(a) (1, 5), 9(c), 29 U.S.C.A., §§ 158(a) (1, 5), 159(c).

"2. Labor Relations Key 203, 673

"On issue of appropriateness of bargaining unit decision is committed to NLRB, and judicial function on petition to enforce is confined to a review of record to determine whether Board's decision can be said to be without foundation in fact and law. National Labor Relations Act, § 9(b), 29 U.S.C.A., § 159(b).

"3. Labor Relations Key 207

"In order to determine on review whether or not NLRB has exercised the wide discretion committed to it within purview of statute authorizing it to determine appropriateness of bargaining unit, Board must disclose the basis of its order and give clear indication that it has exercised discretion with which Congress has empowered it. National Labor Relations Act, § 9(b), 29 U.S.C.A., § 159(b).

"4. Labor Relations Key 207

"NLRB's prior 1951 decision involving employer's operations upon which same issue of appropriateness was made to depend was relevant to consideration of appropriateness of bargaining unit. National Labor Relations Act, §§ 8(a) (1, 5), 9(c), 29 U.S.C.A., § 158(a) (1, 5), 159 (c).

"5. Labor Relations Key 207

"It was incumbent upon NLRB to articulate reasons for its apparently inconsistent findings in two cases involving operations of same motor common carrier employer where in the first proceedings a three-terminal unit was deemed to be inappropriate and Board apparently could find no local autonomy, while in subsequent proceedings Board found one terminal appropriate and also found local autonomy with supervisory powers in terminal manager to make work assignments, discipline, reprimand and effectively recommend discharge of terminal drivers. National Labor Relations Act, §§ 8(a) (1, 5), 9(b, c), 29 U.S.C.A., §§ 158(a) (1, 5), 159(b, c).

"6. Administrative Law and Procedure Key 753

"Integrity of administrative process requires that courts may not accept appellate counsel's post hoc rationalizations for agency action.

"7. Labor Relations Key 513

"NLRB is empowered to prescribe reasonable rules for conduct of an election by secret ballot. National Labor Relations Act, § 9(c) (b), 29 U.S.C.A., § 159(c)(b); App. 29 U.S.C.A., Rules and Regulations, § 102.69.

"8. Elections Key 216

"Privacy of voting booth is accepted and traditional manner and procedure for casting a secret ballot, but ballot by mail is an accepted procedure throughout country as not incompatible with democratic process of secret balloting.

"9. Labor Relations Key 213

"Use of mails was not per se an illegal procedure for conducting representation election by secret ballot. Na-

tional Labor Relations Act, § 9(c)(b), 29 U.S.C.A., § 159 (c)(b); App. 29 U.S.C.A., Rules and Regulations, § 102.69.

"10. Labor Relations Key 213

"Individual ballot, in representation election conducted by use of the mails, of one voter who opened envelope and marked his ballot at his desk in company's office in presence of two other employees and personally sealed it in return envelope and placed it in out-going regular mail was not invalid, absent evidence that anyone saw him actually mark his ballot or that secrecy of balloting was in any way thereby impaired or violated. National Labor Relations Act, § 9(c)(b), 29 U.S.C.A., § 159(c)(b); App. 29 U.S.C.A., Rules and Regulations, § 102.69.

"11. Labor Relations Key 707

"Where there was nothing on record to indicate that evidence sought to be produced for first time in unfair labor practices proceedings were unavailable to employer when he filed his timely post-election objections, which were fairly considered by regional director and disposed of, Court of Appeals would not consider such evidence on petition to enforce order to bargain. App. 29 U.S.C.A., Rules and Regulations, §§ 102.118, 106.69.

"12. Labor Relations Key 213

"Irregularities in conduct of representation election, if any existed, went to validity of individual ballots and not to procedure by which they were cast. National Labor Relations Act, § 9(c), 29 U.S.C.A., § 159(c).

"Marcus W. Sisk, Washington, D. C. (Arnold Ordman, Dominick L. Manoli, Marcel Mallett-Prevost and Warren M. Davison, Washington, D. C., with him on brief), for petitioner.

"Payne H. Ratner, Wichita, Kan., for respondent.

"John A. Criswell, of Myrick, Criswell & Branney, Englewood, Colo., for intervenors.

"Before MURRAH, Chief Judge, PHILLIPS, Circuit Judge, and CHILSON, District Judge.

"MURRAH, Chief Judge.

"In this petition to enforce an N.L.R.B. § 8(a) (5) and (1) unfair labor practice order to bargain with the duly elected and certified representative of the employees the respondent employer challenges (1) the appropriateness of the bargaining unit and (2) the validity of the balloting in the representation election pursuant to which the charging and intervening union was certified as the bargaining agent.

"[1] In the 9(c) representation proceedings the issue was whether the truck drivers at respondent's Denver, Colorado, terminal were an appropriate bargaining unit, the respondent contending that a single terminal unit was inappropriate and the only appropriate unit would be a system-wide unit of all the employer's truck drivers. The trial examiner's findings and rulings were to the effect that the employer was a motor common carrier of petroleum products with its principal office in Enid, Oklahoma, and twenty-nine terminals located in five states, two of which were located at LaJunta and Denver, Colorado. It employed 471 truck drivers and 88 shop employees in the system. Approximately 17 truck drivers and 3 mechanics were working at the Denver Terminal. All of the terminals were controlled and directed from the employer's principal office at Enid where all bookkeeping and administrative records were kept and all policy decisions made. The trial examiner properly observed that although there were several factors tending

to show that a system-wide unit as proposed by the employer could be appropriate, the question was whether these factors were so compelling as to require a finding that such unit was the only appropriate one. He noted that the Denver terminal was geographically separated from the main terminal and from all other terminals by substantial distance, the closest being the LaJunta terminal approximately 180 miles away; that there is at most only an occasional exchange of drivers to and from the Denver terminal; that 'to a certain degree there was local supervision of the drivers and indeed local autonomy in the conduct of its day to day operations.' Specifically, he found that 'the Denver terminal manager possesses the authority to make work assignments, discipline, reprimand and to effectively recommend discharge of Denver terminal drivers.' The examiner also took into consideration as an 'additional' factor the absence of any bargaining history for any of the employer's employees and the fact that no labor organization seeks a broader unit. From this it was concluded that the truck drivers at the employer's Denver terminal were an appropriate bargaining unit. On the basis of this decision the Regional Director directed an election by secret ballot among the employees of the unit found to be appropriate 'subject to the Board's rules and regulations.' The election conducted by mail ballot resulted in a majority for the intervening union.

"The respondent objected to the conduct of the election by mail ballot and unsuccessfully sought to enjoin it in the District Court of Colorado. After the votes were tallied, the respondent filed specific objections to the mail ballot procedure as being contrary to the statutory mandate and the Board's applicable regulations and requested a Board hearing. The Board denied a hearing; the Regional Director considered and overruled the specific objections and certified the union as the bargaining agent.

"The employer refused to bargain with the certified union for the sole purpose of raising in this unfair labor practice proceedings the appropriateness of the unit and the validity of the mail ballot as not in conformity with the rules and regulations of the Board. General Counsel introduced the entire record of the 9(c) representation and election proceedings as the Board's case on the intervening union's unfair labor practice charge. On the basis of this record the examiner found that the employer had refused to bargain with the certified representative of its employees in violation of § 8(a) (5) and (1) and recommended the conventional cease and desist and affirmative order. The Board adopted the findings and recommendations of the examiner and entered an order accordingly.

"[2, 3] We first consider the appropriateness of the unit with full realization that the decision is statutorily committed to the Board with power to determine whether the appropriate unit shall be 'the employer unit, craft unit, plant unit, or subdivision thereof'. § 9(b). The judicial function on petition to enforce is confined to a review of the record to determine whether the Board's decision can be said to be without foundation in fact and law. See N.L.R.B. v. Dewey Portland Cement Co., 10 Cir., 336 F. 2d 117 and cases cited. But, in order to determine on review whether the Board has exercised the wide discretion committed to it within the purview of the authorizing statute, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion which Congress has empowered it.' See Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, quoted in N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438, 443, 85 S. Ct. 1061, 13 L. Ed. 2d 951.

"It is the respondent's contention the evidence is wholly insufficient to support the conclusion that the

Denver terminal is an appropriate bargaining unit; that the proof conclusively shows that the company is a highly centralized, integrated transportation company without requisite autonomy at the terminal level; that in any event the Board has not sufficiently articulated the basis for the exercise of its statutory discretion. Attention is called to the Board's decision in Groendyke Transport, Inc., 92 N.L.R.B. 1332, wherein the Board found in 1951 that a unit comprised of three of respondent's terminals was not an appropriate bargaining unit based upon a finding that 'Although each of its terminals is supervised by a local manager, each of these managers is directly responsible to the employer's traffic manager who is stationed at its principal offices in Enid, Oklahoma. The employee skills, working conditions, and pay rates in all the employer's terminals are identical, and there is frequent interchange of employees between its various terminals as required by the shifts of its business and as directed by its traffic manager * * * They are widely separated geographically and do not correspond to any functional or administrative division of the employer's operations.'

"It is suggested that the Board's findings in the 1951 case are materially inconsistent with the Board's findings on which the present order of appropriateness rests; that there is nothing in the record to show a change in the respondent's operations since the Board's decision except an expansion of his territorial operations and personnel. The present finding and conclusion is said to be inconsistent not only with the prior decision involving this employer, but with a long line of prior decisions involving the transportation industry; and that the Board has not given any clear indication of a change in policy or disclosed the basis for its present order. The plea is that if the Board has now changed its mind or policy concern-

ing the appropriateness of this unit or similar ones, the reasons therefor should be clearly articulated in the present findings pursuant to which a single unit is found to be appropriate.

"[4] In this proceeding the respondent offered in evidence the transcript of the 1951 proceedings on which the Board's decision rested. The examiner sustained General Counsel's objections apparently on the grounds that the decision was too remote to be relevant to the present issue of appropriateness. We think the Board's prior decision involving this respondent's operations upon which the very issue of appropriateness was made to depend was distinctly relevant to the consideration of the appropriateness of this unit. In the first proceeding a three terminal unit was deemed to be inappropriate. The Board now finds that one terminal is appropriate. In the prior proceedings it apparently could find no local autonomy. In the present proceedings it finds local autonomy with supervisory powers in the terminal manager to make work assignments, discipline, reprimand and effectively recommend discharge of terminal drivers. These factors are, of course, distinctly relevant to the question of appropriateness and some reconciliation is in order.

"[5, 6] We think it was clearly incumbent upon the Board in circumstances like these to articulate the reasons for its apparently inconsistent findings in the two cases involving the operations of the same employer. If the operations of the company have undergone a change or if there is a rational difference between the three terminal unit and the single terminal unit, the integrity of its own administrative process requires the Board to so state. Cf. N.L.R.B. v. Davis Cafeteria, Inc., 5 Cir., 358 F. 2d 98; N.L.R.B. v. Capital Bakers, Inc., 3 Circ., 351 F. 2d 45. It may well be that an acceptable rationale exists for the

apparent inconsistency. In his brief General Counsel suggests a plausible basis for drawing a distinction between the appropriateness of a three terminal unit and a one terminal unit based upon distance, functional and administrative considerations. But, as pointed out in N.L.R.B. v. Metropolitan Life Insurance Company, supra, '* * * the integrity of the administrative process requires that "courts may not accept appellate counsel's post hoc rationalizations for agency action"'. We think the reasons which prompted the Supreme Court to decline enforcement in Metropolitan constrain us to decline enforcement in this case.

"The matter is, therefore, remanded for further consideration consistent with the views herein expressed. But, inasmuch as the Denver terminal may ultimately be found to be an appropriate bargaining unit, it becomes necessary to consider the challenged validity of election by mail ballot.

"[7-9] The substance of respondent's objection is simply that an election conducted by mail ballot, as in this case, is not in conformity with the mandate of the statute which provides that the Board '* * * shall direct an election by secret ballot and shall certify the results thereof', 9(c) (1) (B) and with the applicable regulation which provides that '* * * [a]ll elections shall be by secret ballot.' § 102.69, 29 C.F.R. Neither the statute nor the regulation expressly or impliedly forbids the conduct of an election by mail ballot, so long as the mandate for secrecy is vouchsafed. The Board is undoubtedly empowered to prescribe reasonable rules for the conduct of an election by secret ballot, i.e. see N.L.R.B. v. William J. Burns International Detective Agency, 8 Cir., 346 F. 2d 897. And, elections by mail ballot are not uncommon. See Pacific Gas & Electric Co., 3 N.L.R.B. 835; Pacific

Greyhound Lines, 4 N.L.R.B. 520; Southwestern Greyhound Lines, 80 N.L.R.B. 1388; Pennsylvania Power & Light Co., 64 N.L.R.B. 874; Cities Service Oil Co., 80 N.L.R.B. 1512; Pacific Gas & Electric Co., 89 N.L.R.B. 938; Atlas Imperial Diesel Engine Co., 93 N.L.R.B. 268; Southwestern Michigan Broadcasting Co., 94 N.L.R.B. 30; F. W. Woolworth Co., 96 N.L.R.B. 380; Continental Bus System, Inc., 104 N.L.R.B. 599; Simplot Fertilizer Co., 107 N.L.R.B. 1211; Shipowners Association of the Pacific Coast, 110 N.L.R.B. 479; and National Van Lines, 120 N.L.R.B. 1343. The privacy of the voting booth is, of course, the accepted and traditional manner and procedure for casting a secret ballot, but ballot by mail is an accepted procedure throughout the country as not incompatible with the democratic process of secret balloting. No case is cited, and we have found none, wherein the use of the mails has been condemned or challenged as an unacceptable method of conducting an election by secret ballot. See N.L.R.B. v. William J. Burns Internat'l Detective Agency, supra; N.L.R.B. v. O.K. Van Storage, Inc., 5 Cir., 297 F. 2d 74; N.L.R.B. v. Sumner Sand & Gravel Company, 9 Cir., 293 F. 2d 754. We hold that the use of the mails is not per se an illegal procedure for conducting an election by secret ballot.

"Considering the respondent's post election objection to the conduct of the election by mail as in contravention of the statute and regulation, the Regional Director in his supplemental decision noted that it had been consistently held in a 'long line' of cases that the Regional Director may 'in the exercise of his discretion conduct an election by mail ballot where he believes such method to be most suitable'; that 'prior to announcing that balloting would be by mail in this instance, the availability of the voters for a manual election was carefully checked'; that 'an in-

vestigation disclosed that the truck drivers who were to vote in the election could not be scheduled to vote at any single location within a reasonable period of time * * *"; and that in the interest of giving each eligible voter full opportunity to vote with the least inconvenience to the voters and the employer, the election should be conducted by mail. The Director also observed that the notice of election stated that it would be conducted by mail ballot, when the ballots would be mailed, when they were to be returned to the Board and when and where they were to be counted; that in accordance with established Board procedure in mail elections the ballots were mailed directly to employees' homes with detailed instructions as to marking them in secret, sealing them in the return envelopes provided and putting them in the mail without discussion with anyone. All of the envelopes containing the ballots were opened and tallied in the presence of observers for both the employer and the union. The employer's observer challenged three ballots and the union observer challenged five ballots. The name stubs on the envelopes of the remaining unchallenged ballots were then detached and removed in the presence of the observers and without being unfolded were dropped into a basket and mixed together. They were then placed on a table face up and counted.

"[10] Apparently the Director's attention was called to an instance in which one voter opened the envelope and marked his ballot at his desk in the company's office in the presence of two other employees. The Director found that after marking it, he personally sealed it in the return envelope and placed it in the outgoing regular mail and that there was no evidence that anyone saw him actually mark his ballot or that the secrecy of the balloting was in any way impaired or violated. It is not clear

whether respondent relies on this incident to prove his thesis that an election by secret ballot cannot be legally conducted by use of the mails, or whether it is intended to challenge the validity of the individual ballot. But, it is insufficient in either event.

"In the unfair labor practice proceedings respondent offered to prove that when one voter received his ballot by mail, he opened it in the presence of his wife and that they both read it, talked about it and that he voted in her presence after which one of them sealed and mailed the ballot. Respondent also sought by subpoena duces tecum to the supervising examiner to produce in this proceedings all registered mail notices showing the signatures of the persons receiving the ballots and all envelopes bearing the signatures of all parties voting in the election. The declared purpose of this was to show that in many instances wives or members of the family signed these receipts as well as the signatures on the return envelopes. On motion of General Counsel the subpoena was revoked on the grounds that the subpoenaed records were not subject to production under the Board's rules and regulations, i.e. § 102.118, except with permission of the General Counsel which had neither been obtained nor requested by the company.

"[11, 12] In the first place there is nothing on the record to indicate that the evidence sought now to be produced for the first time in the unfair labor practice proceedings was unavailable to the respondent when he filed his timely post election objections which were fairly considered by the Regional Director and disposed of. In the absence of some showing of the unavailability of the evidence justifying non-compliance with § 102.69(a), we will not notice it here. Cf. N.L.R.B. v. Ideal Laundry & Dry Cleaning Company, 330 F. 2d 712; N.L.R.B. v. J. J. Col-

lins' Sons, Inc., 7 Cir., 332 F. 2d 523; N.L.R.B. v. Dewey Portland Cement Co., supra. Moreover, we understand the purpose of the proffered evidence was to condemn the legality of the procedure and not to challenge the integrity of the individual balloting. Irregularities in the conduct of the election, if indeed there be any, went to the validity of the individual ballots and not to the procedure by which they were cast.

"We hold that respondent was accorded a full hearing on all issues raised in the post election proceedings and that the election was valid if on remand the unit is found to be appropriate. The matter is accordingly remanded."

APPENDIX D

National Labor Relations Act, 29 U.S.C.A., § 159(c)(B)

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

APPENDIX E

Title 5, U.S.C.A., § 1002, Administrative Procedure Act

"(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. *No person shall in any manner be required to resort to organization or procedure not so published.*"

APPENDIX F

"Sec. 102.69. Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing. * * * (a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot * * *. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe * * *."

NLRB 707
(2-62)

EXHIBIT "B"

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELEC

RIGHTS OF EMPLOYEES

Under Section 7 of the National Labor Relations Act, employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

PURPOSE OF ELECTION

An election by secret ballot will be conducted, under the supervision of the Regional Director of the National Labor Relations Board, among the eligible voters described herein, to determine the representative, if any, desired by them for the purpose of collective bargaining with their employer.

SECRET BALLOT

The election will be by SECRET ballot. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to the Regional Director or his agent in charge of the election. Your attention is called to Section 12 of the National Labor Relations Act:

> ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

An agent of the Board will hand a ballot to each eligible voter at the voting place. The voter will then mark his ballot in secret in a voting booth and fold it. The voter will then personally deposit the folded ballot in a ballot box under the supervision of an agent of the Board. A majority of the valid ballots cast will determine the results of the election.

Incorporated herein, for your information only, is a copy of the official ballot.

AUTHORIZED OBSERVERS

Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers

THOSE ELIGIBLE TO VOTE:

All truckdrivers employed b
who were employed during th

THOSE NOT ELIGIBLE TO VOTE:

All other employees, guards

TIM

The election will be conduc
5:00 p.m. on July 6, 1964,
be returned to the Twenty-S
lations Board, 609 Railway
will be received no later t
be opened and counted at th
Any voter who does not rece
contact the National Labor
Denver, Colorado, Telephone

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Appendix III

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

LOYEES

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ECTION

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DUTIES PURSUANT TO THIS ACT
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ONE YEAR, OR BOTH.

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supervision of an agent of the Board. A
ults of the election.
a co y of the official ballot.

SERVERS

equal number of observers, this number to

VOTING UNIT

THOSE ELIGIBLE TO VOTE:

All truckdrivers employed by the Employer at its Denver, Colorado, terminal, who were employed during the payroll period ending May 31, 1964.

THOSE NOT ELIGIBLE TO VOTE:

All other employees, guards, watchmen and supervisors as defined in the Act.

TIME AND PLACE OF ELECTION

The election will be conducted by mail ballots. Ballots will be mailed at 5:00 p.m. on July 6, 1964, to voters at their home addresses. Ballots are to be returned to the Twenty-Seventh Regional Office of the National Labor Relations Board, 609 Railway Exchange Building, Denver, Colorado, so that they will be received no later than 5:00 p.m. on July 14, 1964. The ballots will be opened and counted at the Board Offices on July 15, 1964, at 10:00 a.m. Any voter who does not receive his ballot by July 9, 1964, should immediately contact the National Labor Relations Board, 609 Railway Exchange Building, Denver, Colorado, Telephone 534-4151, Extension 513.

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

FOR CERTAIN EMPLOYEES OF

of the election. Your attention is called to Section 12 of the National Labor Relations Act

ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

An agent of the Board will hand a ballot to each eligible voter at the voting place. The voter will then mark his ballot in secret in a voting booth and fold it. The voter will then personally deposit the folded ballot in a ballot box under the supervision of an agent of the Board. A majority of the valid ballots cast will determine the results of the election.

Incorporated herein, for your information only, is a copy of the official ballot.

AUTHORIZED OBSERVERS

Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers will (a) act as checkers at the voting place and at the counting of ballots, (b) assist in the identification of voters, (c) challenge voters and ballots, and (d) otherwise assist the Regional Director or his agent.

ELIGIBILITY RULES

Employees described under VOTING UNIT in this Notice of Election who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off and employees in the military service of the United States who appear in person at the polls shall be eligible to vote. Also eligible are those employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period, and their replacements. Employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than 12 months prior to the date of the election and who have been permanently replaced, shall not be eligible to vote.

CHALLENGE OF VOTERS

The challenge of a voter MUST be made before the voter has deposited his ballot in the ballot box.

INFORMATION CONCERNING ELECTION

The Act provides that only one valid representation election may be held in a 12-month period. Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who desires to raise any question concerning the holding of an election, the voting unit, or eligibility rules may do so by communicating with the Regional Director or his agent in charge of the election.

NATIONAL LABOR RELATIONS BOARD
600 Federal Exchange Building
17th and Arapahoe Streets
Denver, Colorado 80202

The election will be cond
5:00 p.m. on July 6, 1964
be returned to the Twenty
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will be received no later
be opened and counted at
Any voter who does not re
contact the National Labo
Denver, Colorado, Telepho

National
OFFICIAL
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Do you wish to be re
INTERNATIONAL BROTHERHOOD

MARK AN

YES ☐

DO NOT SIGN
If you spoil this b

THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION ... MUST NOT BE DEFAC

U.S. GOVERNMENT PRINTING OFFICE

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The election will be conducted by mail ballots. Ballots will be mailed at 5:00 p.m. on July 6, 1964, to voters at their home addresses. Ballots are to be returned to the Twenty-Seventh Regional Office of the National Labor Relations Board, 609 Railway Exchange Building, Denver, Colorado, so that they will be received no later than 5:00 p.m. on July 14, 1964. The ballots will be opened and counted at the Board Offices on July 15, 1964, at 10:00 a.m. Any voter who does not receive his ballot by July 9, 1964, should immediately contact the National Labor Relations Board, 609 Railway Exchange Building, Denver, Colorado, Telephone 534-4151, Extension 513.

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

SAMPLE

FOR CERTAIN EMPLOYEES OF
GROENDYKE TRANSPORT, INC.
Denver, Colorado

Do you wish to be represented for purposes of collective bargaining by

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 961

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

…TICE OF THIS ELECTION … MUST NOT BE DEFACED BY ANYONE

APPENDIX H

"Sec. 101.19. Consent adjustments before formal hearing.

"(a) (1) The consent-election agreement followed by the regional director's determination of representatives is the most frequently used method of informal adjustment of representation cases * * *. A Board agent arranges the details incident to the mechanics and conduct of the election. For example, he usually arranges preelection conferences in which the parties check the list of voters and attempt to resolve any questions of eligibility. Also, prior to the date of election, the holding of such election shall be adequately publicized by the posting of official notices in the establishment whenever possible or in other places, or by the use of other means considered appropriate and effective. These notices reproduce a sample ballot and outline such election details as location of polls, time of voting, and eligibility rules.

"(2) The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As to the mechanics of the election, a ballot is given to each eligible voter by the Board's agents. The ballots are marked in the secrecy of a voting booth. The Board agents and authorized observers have the privilege of challenging for reasonable cause employees who apply for ballots."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1285

GROENDYKE TRANSPORT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A22-A35) is reported at 372 F. 2d 137. The Board's decision and order in the unfair labor practice case (Pet. App. A1-A12) are reported at 154 NLRB 1040. The Board's decision in the prior representation case (Pet. App. A13-A21) is unreported.

JURISDICTION

The decision of the court of appeals was entered on January 20, 1967, and a petition for rehearing was

denied on March 1, 1967 (Pet. App. A22). The petition for a writ of certiorari was filed on April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer's contentions respecting the validity of a representation election conducted by the National Labor Relations Board and won by the union are ripe for review by this Court where the court of appeals, although overruling those contentions, has remanded the proceeding to the Board for further consideration of its finding respecting the appropriateness of the bargaining unit in which the election was conducted.

2. If the first question be answered affirmatively, there are these further questions:

(a) Whether a representation election conducted by mail is valid under the National Labor Relations Act.

(b) Whether the employer was properly denied leave to relitigate in the unfair labor practice proceeding an issue which he had an opportunity to litigate in the prior representation proceeding.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Board's Rules and Regulations (29 C.F.R. 102.1 *et seq.*) are set forth in the Appendix, *infra*, pp. 8-9.

STATEMENT

Petitioner ("the Company") operates a truck freight line, which has 29 terminals located in five states (Pet. App. A1-A3). In March 1964, the International Brotherhood of Teamsters, Local Union No. 961 ("the Union") filed a representation petition requesting certification as bargaining agent for the drivers at the Company's terminal in Denver, Colorado (R. 146-149).[1] The Board's Regional Director overruled the Company's contention that only a system-wide unit was appropriate, and conducted a representation election by mail in the Denver unit, in which 14 votes were cast for the Union and 2 were cast against it. (Pet. App. A2, A13).

The Company filed timely objections to the election, contending that the mail balloting was not a "secret ballot" as required by the Act and the Board's Rules and Regulations (Pet. App. A14-A15). After investigation, the Regional Director overruled the Company's objections (Pet. App. A13-A21). The Director found that the mail election was necessary because the drivers could not be scheduled to vote at any single location within a reasonable period of time (Pet. App. A16). He further found that the election had been conducted in accordance with established Board procedures for mail elections, and that no evidence had been adduced to show that the secrecy of the balloting was impaired or violated (Pet. App. A19-A20). Accordingly, the Director certified the Union as the bar-

[1] "R" refers to the "Transcript of Record" in the court of appeals.

gaining representative of the Company's employees (Pet. App. A21). The Company filed with the Board a request for review of the Regional Director's decision, including a request for a hearing on its objections (R. 137-140). The Board denied the Company's request, concluding that it raised "no substantial issues warranting review" (R. 140).

Thereafter, the Company refused the Union's request to bargain, the Union filed unfair labor practice charges, and a complaint was issued (Pet. App. A1, A4). At the hearing before the Trial Examiner, the Company defended its refusal to bargain solely on the ground that the Union's certification was invalid (Pet. App. A4). The Examiner found that the issues raised by the Company had been resolved in the representation proceeding and that, since no newly available evidence had been offered, those issues could not be relitigated. Accordingly, the Examiner concluded that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Pet. App. A7, A8-A9). The Board affirmed the Examiner's conclusion and ordered the Company to bargain, on request, with the Union (Pet. App. A9-A10, A12).

The court of appeals held that the Board had failed adequately to explicate the basis for its finding that a single terminal unit was appropriate, in view of its holding in an earlier case involving the same company that a three terminal unit was inappropriate. It therefore remanded the case to the Board for further consideration of the unit finding (Pet. App. A29-A31,

A35).[2] However, since the Denver unit might ultimately be found appropriate, the court went on to consider the Company's contentions that the mail election was unlawful and that it was wrongfully denied a hearing on its objections to the election, and found these contentions to be without merit (Pet. App. A31-A35).

ARGUMENT

1. Contrary to the Company's assertion (Pet. 1), the court of appeals entered no decree enforcing any portion of the Board's order. Rather, the court, finding that the Board had not adequately articulated the basis for its finding that the bargaining unit was appropriate in the present case, remanded the case to the Board for further consideration of its unit finding (Pet. App. A31). Thus, there is no outstanding court decree compelling the Company to obey the Board's order.

Although the Board recently reaffirmed its unit determination (see n. 2, *supra*), the court of appeals may or may not enforce the order based upon that decision. While the court of appeals rejected the Company's objections to the manner in which the election was conducted—a ruling that may preclude the Company from relitigating those objections in the court of appeals—the Company will have adequate opportunity to seek review of those issues in this Court if

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[2] In the remanded proceedings the Board on April 28, 1967, again held that the Denver terminal constituted an appropriate unit. *Groendyke Transport, Inc.*, 164 NLRB No. 28.

the court of appeals ultimately enforces the Board's order. Review at this time would therefore be premature.

2. In any event, there is no substance to the Company's contentions.

(a) Both the Act and the Board's Rules and Regulations simply provide that representation elections shall be "by secret ballot" (Appendix, *infra*, p. 9; Pet. App. A36); there is no requirement that manual, as opposed to mail, balloting procedures be used. Congress has entrusted the Board with broad discretion in conducting representation elections (*National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330), and the Board did not abuse that discretion here. As the court of appeals stated (Pet. App. A32), "ballot by mail is an accepted procedure throughout the country as not incompatible with the democratic process of secret balloting." The facts detailed in the court's opinion show (Pet. App. A33) that every effort was taken to safeguard the secrecy of the mail vote. No probative evidence was submitted to the Regional Director showing that the vote of any employee was in fact revealed (Pet. App. A19-A20).[3]

(b) The Board properly refused to permit the Company to reopen the issue of the secrecy of the

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[3] The fact that the Board's published rules do not specifically provide for mail ballots did not make the Board's action in this case invalid under the Administrative Procedure Act (See Pet. 15-17). An agency may promulgate rules through its decisional process, no less than through formal rule-making procedures. See *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202.

election at the unfair labor practice hearing. See Section 102.67(b) of the Board's Rules (Appendix, *infra*, p. 9). As the court below observed, nothing in the record indicates that the evidence which the Company sought to introduce was unavailable when the Company filed its post-election objections, "which were fairly considered by the Regional Director and disposed of" (Pet. App. A34). In the absence of a showing that the evidence was unavailable at the time of the representation proceeding, it was properly excluded at the unfair labor practice stage. *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 160-161; *National Labor Relations Board* v. *Rexall Chemical Co.*, 370 F. 2d 363 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARCUS W. SISK,
Attorney,

National Labor Relations Board.

MAY 1967.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

The relevant provisions of the National Labor Relations Board Rules and Regulations, Series 8, as amended (29 C.F.R. 102.1 *et seq.*), are as follows:

Sec. 102.67(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. * * *

* * * *

(f) * * * Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

* * * *

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